Office Supreme Court, U.S.
FILED
SEP 29 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 164 [redacted].

VIRGIL D. DARDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

REPLY BRIEF

WILLIAM LEE FROST
Attorney for Petitioner
575 Lexington Avenue
New York, N. Y. 10022

MAURICE N. NESSEN
Of Counsel

INDEX

PAGE

Statement 1

The Facts 1

ARGUMENT 6

1. Length of Trial 6

2. Pretrial Discovery 7

3. Mr. Dardi's Other Points for Review 12

CONCLUSION 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 164 [redacted].

VIRGIL D. DARDI,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

REPLY BRIEF

Statement

Petitioner Virgil D. Dardi submits this Reply Brief in answer to the brief of the Solicitor General in opposition to the petition for a writ of certiorari ("S. G. Brief").

The Facts

The Solicitor General's brief has glossed the record and misstated facts. He has placed Mr. Dardi at the heart of Guterma's matters, although the record is clear that he was an outsider and not one of Guterma's true partners.

(i)

(S. G. Brief, pp. 4-5)

It is not a fact that Mr. Dardi arranged for the purchase of shares of United Dye stock for Guterma with any venal

purpose to sell unregistered stock or bilk United Dye. Guterma's testimony was that Mr. Dardi wanted Guterma to purchase stock and join United Dye for only the highest motives—to benefit the company itself (*e.g.*, 3379-86a, 3387-88, 3388-91, 9682; Def. **Exhs.** AA and K).

(ii)

(S. G. Brief, p. 5)

It was Guterma's testimony that his manipulations with Garfield and Pasternak to acquire Franklin County Coal Corporation were all achieved without consultation with, and the knowledge of, Mr. Dardi; Mr. Dardi never had an interest in Franklin; in fact, Guterma constantly touted Franklin as a very good investment for United Dye to Mr. Dardi at all times prior to the Handridge-United Dye merger (*e.g.*, 755-58, 3956-60, 787, 788-90, 919).

(iii)

(S. G. Brief, p. 5)

There was no evidence whatsoever that Mr. Dardi had or used "nominees" to secure for himself a single share of the 75,000 shares of United Dye stock as part of the "merger arrangements."

(iv)

(S. G. Brief, p. 6)

The citations of the Solicitor General to the record do not support the statement that Mr. Dardi sold any United Dye shares in order to reduce the price of the stock at the time of the Handridge-United Dye merger (923-29, 1187). The only persons who deliberately sold stock to reduce the market price in anticipation of the Handridge-United Dye

merger were Guterma, Garfield and Pasternak; and Mr. Dardi was not present and never participated in their plot (927-28). In fact, Guterma hid his group's market activity in the United Dye stock from Mr. Dardi and threw Mr. Dardi off the scent by accusing Mr. Dardi of selling stock without Guterma's knowledge (*e.g.*, Def. Exhs. II, JJ; 3883, 3918-27, 3939-41; Gov. Exh. 14).

(v)

(S. G. Brief, p. 6)

It is true that Mr. Dardi arranged to have United Dye obtain control of Bon Ami; but he did this because it looked like, and was, a very good deal for United Dye; and in fact it proved to be a great boon to the company (*e.g.*, 1343-44, 1345-47).

(vi)

(S. G. Brief, p. 7)

Mr. Dardi was not a party to an agreement to sell United Dye shares after the Handridge-United Dye merger and was not present at any such agreement-making (1644-45); the Solicitor General's citations do not support any such inference and Mr. Dardi's name never appears on the pages cited (1587-1601, 1620, 16725). The facts are that Mr. Dardi did not own a single share of the stock coming out of the merger and did not make a cent from the distribution of profits by Guterma and his true partners (*e.g.*, 3373-74, 3359-74).

(vii)

(S. G. Brief, p. 7)

It is disturbingly untrue that (a) Mr. Dardi "convinced" a "conspirator" not to sell stock coming from the Hand-

ridge-United Dye merger and (b) that Mr. Dardi "arranged" to set up "an over-the-counter boiler room operation" for the sale of that stock. It was Guterma—and Guterma alone far from Mr. Dardi's presence—who convinced his co-conspirator Pasternak to stop selling United Dye stock on the market following the merger (1590-1601). Guterma's testimony was clear that Mr. Dardi had nothing to do with that event or the events that followed (1590-97). After Guterma persuaded Pasternak not to sell, Guterma arranged the distribution without consulting Mr. Dardi and through the use of his own close associates (*e.g.*, 1600-01, 9174-75, 9178-80, 16693-762).

(viii)

(S. G. Brief, pp. 7-8)

Mr. Dardi did not arrange for Hughes to use his brokerage account.

(ix)

(S. G. Brief, p. 8)

Guterma never testified that Mr. Dardi introduced him to Herman Brann as part of any stabilization program (*e.g.*, 1664-65, 4302-03). Guterma contradicted Brann's later testimony that Mr. Dardi secured part of Brann's commission or profits—as made clear by the citation of the Solicitor General (1673; see also 1669-72, 4415-16).

(x)

(S. G. Brief, p. 8)

According to Guterma, Mr. Dardi was not told by him that "nominees" were going to sell United Dye stock for Guterma and his group shortly after the Handridge-United

Dye merger and was not a party to discussions of such a plan (1644-45); the Solicitor General's citations to the record of Mr. Guterma's testimony are no support for the contrary proposition (808-17, 880-82, 1594-97).

(xi)

(S. G. Brief, p. 8)

The publicity materials shown to Mr. Dardi by Paul Hughes were a 95% reprint of United Dye annual reports (12008 *et seq.*).

(xii)

(S. G. Brief, p. 11)

The Solicitor General ignores the fact that Guterma testified that Mr. Dardi would have nothing to do with the so-called Bender matter (1797-98).

(xiii)

We have here but tried to illustrate how the Solicitor General has glossed the record. Our petition provides the more detailed answer to the aim of the Solicitor General to read Mr. Dardi into the heart of Guterma's plots. We repeat again: the jury had ample evidence to find that Mr. Dardi was not a party to the conspiracy alleged in the indictment; Guterma's testimony formed a strong basis to exculpate Mr. Dardi completely.

ARGUMENT

1. *Length of Trial.*

In our petition, we showed that this case was transformed from an estimated 6-to-8 week trial to an 11½-month trial by unnecessary colloquy that ate up more than half the transcribed record (Petition, pp. 41-42). The Court of Appeals conservatively said the jury "was subjected to four months of enforced attendance at the debating contest."

Now the Solicitor General suggests that the inordinate length of the trial in the District Court had mostly to do with the complexity of the trial and the number of defendants. This is plainly not so. Well over half of the record here—and what would have been thousands of pages in off-the-record discussions—had nothing to do with the complexity of the trial; it was colloquy that ate up time, that devoured months of time (see Petition, pp. 42-45).

Without citation to the record, the Solicitor General states the colloquy was "largely of [petitioners'] own counsel" (S. G. Brief, p. 14). That is not so, either. Despite the fact that there were many more defense counsel than Government counsel, the talking as between the defense and the Government was about equally divided; the trial court led all sides. And the great bulk of counsel's talking was not only invited by the trial court, but done at the insistence of the trial court. Defense counsel and Government counsel are, of course, under a duty to speak when the court wants them to speak and to argue their case as fully as is required; this was recognized by the trial court (5587, 20827).

In seeking reasons for the length of the trial, the Solicitor General notes that the trial court said twice on the record that an inordinate amount of time supposedly was

being taken by defense counsel between questions and "rummaging around for papers" (12034-35, 36701). The colloquy figures reduce this supposed source of time-consumption to a filament. The Solicitor General—in grasping at these two comments by the District Court—only highlights the fact that defendants were prejudiced into "rummaging around for papers" in front of the jury because they did not have proper pretrial discovery and were confronted with the difficulty of cross-examining upon papers newly shown to them (*e.g.*, 7381, 7595, 9354, 15494-96, 18315-16).

Next, the Solicitor General suggests that one of the great causes for the length of trial was the time taken by the many defendants on cross-examination (S. G. Brief, p. 14). In its brief to the Court of Appeals, the Government estimated that its direct case, apart from colloquy, should have taken about 4 weeks (Gov. Brief to Court of Appeals, pp. 141-42). Under the Government's formula, which was based on the number of pages devoted more or less to some testimony, defendant's cross-examination of witnesses should have taken no more than 6 or 7 additional weeks.

Finally, the Solicitor General sees no prejudice in all events. We have stated our position concisely in our petition for a writ of certiorari and respectfully refer the Court to it (Petition, pp. 47-52).

2. *Pretrial Discovery.*

The Solicitor General argues that Mr. Dardi's discovery motions under Rules 17(c) and 16 of the Federal Rules of Criminal Procedure were not well grounded; then he argues that, in any event, everything required under this Court's decision in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), was in fact offered to defense counsel, who

must take the responsibility for not viewing the material (S. G. Brief, pp. 15-20).

In making both points, the Solicitor General errs on the facts and the law.

The first 29 categories of documents covered by Mr. Dardi's original motion for discovery and inspection covered the most vital type of documentary evidence in the case: letters, checks, memoranda and the like that went to the heart of the alleged conspiracy (27577-80). While the Government claimed to have returned many originals to the companies of individuals involved (28278), there is no question that the Government retained many hundreds of such documents—either copies or originals—for many years and throughout the trial (29221-29222).

Items 30 through 54 of Mr. Dardi's motion asked for the documentary ingredients that went into the frauds as pleaded in Counts 6 through 30 of the indictment; the prosecution was later to volunteer only confirmations and brochures. The fact that Mr. Dardi was not named as the defendant in Counts 6 through 30 does not mean that these items were "not discoverable" as the Solicitor General now urges. For proof of those counts were, on the Government's theory, relevant to proof of the conspiracy count (see Gov. Brief in Court of Appeals, pp. 137-38). And certainly the particulars on the counts which did not involve Mr. Dardi directly were the ones on which he most needed discovery.

As to Item 55, the Solicitor General states that Mr. Dardi and his co-defendants could have inspected these statements made to the SEC at the New York office of the SEC (29352). The Solicitor General does not mention that defense counsel did go to the SEC office before trial to look at testimony, but they were prohibited from taking any notes (27146,

29414-15). That rule was only changed for them eight days before trial after complaints to the trial court (29211, 29214-17, 29420, 29345 *et seq.*). And no defense counsel could see anything but the minutes of the testimony of his own client (*ibid.*).

In a supplementary request for inspection, Mr. Dardi's counsel asked for correspondence and written communications among defendants and co-conspirators during 1955, 1956 and 1957—the crucial years involved (29178, 28019-26). The Solicitor General justifies the denial of this request by noting that in the district court the Government argued that the material was not producible since none of it could be used in evidence (S. G. Brief, p. 17). The fact of the matter is that the correspondence among defendants and alleged co-conspirators was admitted in evidence and proved to be the most fruitful source of claim and counterclaim (*e.g.*, Def. Exhs. H, JJ, K). What correspondence in the hands of the Government may have contained helpful admissible evidence, petitioners shall never know.

Finally, the Solicitor General has failed to advert to motions made by other defendants for discovery and inspection of documents, of which all defendants had the benefit (27577 *et seq.*, 27421-37, 27340-43).

Actually there is no question that (i) all the evidence that the Government introduced at trial would have fallen under the categories delineated by the various motions of defendants, (ii) the documents that the prosecution later offered to show shortly before trial, but under restrictions, would have also fallen under those categories, and (iii) the Government was the only available source for the documents.

The Solicitor General now argues, as the Government did below, that there were adequate substitutes for a proper discovery.

In our petition, we have shown all the so-called substitutes and offers for production of documents were meaningless gestures at discovery (Petition, pp. 34-37). The Solicitor General in justifying the Government's "substitutes" has made out a fact pattern that bears no resemblance to what happened (S. G. Brief, pp. 17-18). We will try to set the record straight.

The list of 68 itemized records that were available at the office of the United States Attorney's office were offered 12 days before trial. The records covered were nothing but voluminous accounting records of brokerage houses, the bulk of whose pages were irrelevant. Those documents were in cartons in two rooms; less than 1% of the documents had ever been seen by Mr. Dardi's counsel before; it took some 12 to 13 hours for defendant Swann, an attorney, to examine only part of the first category of documents (29414, 29377, 29410-11). Defense counsel noted the fruitlessness of combing through cartons of brokerage records on short notice without reference to relevant pages; it would have taken months of work not 12 days, although counsel were prepared to do that if time was allotted to them (29410-11).

Following the offering of this list of 68 types of records, the Government produced a second list of documents—placed in 44 categories. The documents in these categories were not to be turned over unless the defendants made certain concessions, at first unspecified (29353, 28442). The trial court suggested that counsel should enter into a stipulation of authenticity which would cover specifically enumerated documents, *after* defendants had seen the documents (29353).

It was the prosecution that did not follow the court's suggestion concerning a stipulation in covering this second list. Its offered stipulation called for defendants to sign up with-

out first seeing the documents; there was no provision for the manner, place and time of production; there were no specific designations of documents as contemplated by the trial court; defense counsel were expected to review every single document among thousands and state specific objections or waive their rights forever in the 7 days that remained before trial; the bona fideness of objections was not to be determined by counsel but was to be determined before trial by the trial court (29354-55, 29375-428). While the prosecution was willing to change the phrasing of its stipulation, it was unwilling to change the substance of its requirements and would consent to no adjournments to allow for inspection (*ibid.*). The stipulation was refused.

Accordingly, it was not a fact that everything required under the *Bowman Dairy Company* case was offered; nothing was offered in any meaningful way before trial.

We find it strange that the Solicitor General relies on the fact that the trial court stated that if necessary it would adjourn the trial during the course of the trial if defendants were confronted with a mass of unfamiliar documents; for the trial court recognized that if there were "goes and long stops" at trial, defendants would be prejudiced (29408). Moreover, defendants could never see most of the documents covered by their motions no matter what sort of adjournments would be given, because they were never offered in evidence by the Government.

Finally, we do not understand what comfort the Solicitor General gets from the fact that "less than 10%" of the documentary evidence was introduced through the first witness, Guterma (S. G. Brief, p. 19). Guterma was the key to the Government's success; it was most necessary for defendants to have available all the documents that went to the essence of the case while he was on the stand.

3. *Mr. Dardi's Other Points for Review.*

The Solicitor General's brief runs away from most of the other legal issues raised by our petition.

In dealing with our point concerning the limitation of cross-examination of Lehrich, the Solicitor General says not a word about the fact that Lehrich's conduct and his statements were admitted through other witnesses against Mr. Dardi under the law of conspiracy (S. G. Brief, p. 20). The cross-examination of Lehrich (with attending colloquy) may have consumed 250 pages, but it was confined to the Bender matter. In view of the law of conspiracy, we submit again that "the general federal rule" amounted to a deprivation of the right to confront Lehrich on his own statements and acts already in the record for the Government.

The Solicitor General's argument that Lehrich might have been called by the defendants, if adopted as an excuse, would allow any Government witness to escape without cross-examination. It is a silly argument; and here the trial court refused to rule that leading questions could be put to Lehrich if he were called by the defense (18451, 18619-41).

In turning to the prosecutor's asking defense witness McCollom about a supposed arrest, the Solicitor General does not mention *Michaelson* v. *United States*, 335 U. S. 469 (1947) and the rule of reliability that the case lays down—and thereby misses the whole point (compare Petition, pp. 69-72; with S. G. Brief, pp. 21-22).

As to the prosecutor's several statements to the jury that the two conspirators Eveleigh and Lehrich would have testified cumulatively for the Government, the Solicitor General argues that the prosecutor was justified because of statements by one defense counsel (not Mr. Dardi's) and

a defendant appearing *pro se* in their summations concerning the witness Eveleigh.

Mr Dardi is not responsible for what other defense counsel and defendants say. And most clearly, as the Court of Appeals found, what was said by defendants did not justify the repeated statements of the prosecutor—on both Eveleigh and Lehrich. For there is no doubt that the prosecutor vouched for what these two witnesses would have said on the merits; he injected and re-injected a claim of personal knowledge. His words could not be clearer (25546, 25548, 2551, 2551-52; Petition, pp. 59-60). The jury could take it for nothing else but personal knowledge. Lehrich had taken the stand and the jury knew that he had been interviewed by the prosecutors and had testified before grand juries (18470-71, 19041-43, 19183, 19187).

Lastly, it is clear on the record below that the prosecutor did call a prospective witness before the grand jury during trial and there went beyond any proper scope of examination into any alleged obstruction of justice by delving into matters relating to the pending case.

The trial court did not find, as the Solicitor General now suggests (S. G. Brief, p. 30), that the prosecutor's purpose was not "even in part" to prepare for trial (7235). That is another gloss. The trial court's opinion talked in terms of "the sole or dominant purpose" of the prosecutor and found 45 questions that did not seem to relate to the obstruction of justice "investigation" (7231, 7232). In any event, the trial court's subjective conclusion has no significance. The Solicitor General does not even argue the "sole or dominant purpose" rationale here (S. G. Brief, p. 30). The fact is that the prosecutor used the grand jury to aid a pending case. Therefore, he abused grand jury process.

CONCLUSION

For the reasons stated in our petition we urge again that this Court grant Mr. Dardi's petition for a writ of certiorari.

Respectfully submitted,

WILLIAM LEE FROST
Attorney for Petitioner
Virgil D. Dardi
575 Lexington Avenue
New York, N. Y. 10022

MAURICE N. NESSEN
Of Counsel